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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/671,459	09/29/2003	Jason A. Barba	8902.01	6656

7590 07/16/2004

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EXAMINER
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WEINSTEIN, STEVEN L

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 07/16/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

**Application No.**

10/671,459

**Applicant(s)**

BARBA, JASON A.

**Examiner**

Steven L. Weinstein

**Art Unit**

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-16 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-16 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |  |
|--|--|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. ____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)            |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date <u>9/29/03</u> . | 6) <input type="checkbox"/> Other: ____  |

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claim 1-11 and 13-15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Tamasaki (JP 10-215759) in view of Mederer (EP 349841), and Neuhauser (FR 2744593), or vice versa, i.e. Mederer and Neuhauser in view of Tamasaki, both, further in view of Manoski (6,159,511), Heppe (873,369), Mueller (1,494,861) Renner (2,924,529), Eales (5,066,502), Josephsohn (D69,277), Harris et al (D274859), Bernat (EP 447733), Gardner (3,366,077), Oprean (1,913,851), Devillars (G.B. 302303), Sisco (D 54,782) Swiss colony, Christmas Book 1982.

In regard to claim 1, Tamasaki discloses a multi-layered edible novelty comprising an interior layer of a hard edible and an exterior layer made from a softer edible, which exterior layer surrounds the interior layer. As disclosed, applicant chooses a soft layer surrounded by a harder layer because his composite product is intended to simulate a "real-life", recognizable object; i.e. bone surrounded by flesh. This is precisely why Tamasaki chooses a softer exterior component and a harder interior component. That is, Tamasaki teaches it was not only conventional to provide an edible shaped, composite food to simulate "real life" recognizable objects but Tamasaki also specifically teaches simulating a body part, with the composite having a harder interior of one edible and a softer exterior of another edible to simulate both the flesh and bone of a chicken. Claim 1 differs from Tamasaki in the particular conventional edible materials used to impart a harder interior and a softer interior. That is, Tamasaki employs a hard

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candy and a soft candy. The particular conventional edible materials one chooses to employ i.e. a hard and soft Candy, to simulate a hard and soft component of the simulation is seen to have been an obvious matter of choice and personal preference. This is especially true since, as evidenced by the art taken as a whole, the art not only is replete with composite edible simulations, including candy composites, but the art also teaches selecting the composites based on their similarity to the real life products in terms of relative hardness and softness. For example, Mederer discloses a candy composite, which simulates real life recognizable objects such as a hamburger wherein the simulated bread layers are foamed soft candy and the simulated meat layer is a harder fruit gum layer. Similarly for Neuhauser who also teaches a composite confectionary wherein the components are of different consistency and shape to simulate a hamburger. Manoski et al, Heppe, Mueller and Renner are relied on as further evidence of the conventionality of employing composite confections to simulate real-life recognizable objects whereas Eales, Josephsohn, Harris et al, Bernat, Gardner, Oprean, Swiss Colony, Devillars and Sisco are even further evidence of simulations in confectionary material, including one that appears to have been intentionally Shaped to look like Charlie Chaplin (i.e. Sisco). Similarly, it would have been obvious to modify Mederer as further evidenced by Neuhauser and to employ other hard/ soft, composite shapes as taught by Tamasaki.

In regard to claims 2 and 3, which recite chocolate and gummi products, once it was known to employ edibles and particularly confectionary material to provide edible simulations, the particular conventional material one chooses to select is seen to have been an obvious matter of choice. It is noted that Mederer employs a gummi composition in his composite simulation and the art is replete with chocolate used in simulations. In regard to claim 4, which recites a

composite of two components to represent both skin and flesh, and a skeletal part of a human body part, once it was known to shape food products to simulate recognizable real-life objects, the particular object one chooses to simulate is unequivocally seen to have been an obvious matter of choice and /or design, especially when applicant is not even the first to employ an edible composite to simulate flesh and bone. In regard to claim 6, whether the products are molded in two or three dimensions is seen to have been an obvious matter of choice. Obviously, the art provides primarily three-dimensional simulations since they are more realistic looking. It is not clear what a flat two-dimensional representation means in this regard. Does this mean that the molded product is relatively thin or flat; a back surface is flat (like Sims (D 256512); or is the molded object shaped to be paper thin with essentially no thickness and no surfaces projecting above the plane? Clarification is requested. In regard to claim 59 and 10, as noted above, the particular recognizable shape one chooses to impart to the edible is seen to have been an obvious matter of choice and design.

Claims 12 and 16 are rejected under 35 U.S.C. 103(a) as being unpatentable over the references as applied to claim 1 above, and further in view of Burt ('324), Burt ('997), Musher ('700).

Claims 12 and 16 recite a stick with the interior layer mounted thereon, to impart a handle function. As evidenced by Eales, Oprean, Burt ('324), Burt ('997) and Musher ('700), it was notoriously old to provide a composite food, including a confectionary core, and associate the composite food with a carrier or handle wherein the core is coupled to the handle. To modify the combination for its art recognized and applicant's intended function would therefore have been obvious.


The remainder of the references cited on the USPTO 892 forms are cited as art of interest.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Steven Weinstein whose telephone number is (571) 272-1410. The examiner can normally be reached on Monday thru Friday from 6:00 AM to 5:30 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Weinstein/LR  
June 15, 2004

  
STEVE WEINSTEIN  
PRIMARY EXAMINER 1761  
7/13/04